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In the Supreme Court of the United States

ARTHUR ANDERSEN LLP,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

KERRY A. MILLER
ARTHUR ANDERSEN LLP
33 W. MONROE
18TH FLOOR
CHICAGO, IL 60603
(312) 507-2072

MAUREEN E. MAHONEY
Counsel of Record
J. SCOTT BALLENGER
MATTHEW K. ROSKOSKI
LATHAM & WATKINS LLP
555 11TH STREET, N.W.
SUITE 1000
WASHINGTON, DC 20004
(202) 637-2200

CHARLES A. ROTHFELD
LEE H. RUBIN
MAYER, BROWN, ROWE & MAW LLP
1909 K STREET, N.W.
WASHINGTON, DC 20006
(202) 263-3000

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ARGUMENT

It is now apparent why the United States initially waived its opposition and this Court was required to call for a response. The United States is forced to concede that the decision below conflicts at least with the Third Circuit's decision in *United States v. Davis*, 183 F.3d 231 (3d Cir. 1999). And the government's arguments against certiorari are built on sand. Its lengthy (and erroneous) treatment of the facts is an irrelevant digression; its waiver arguments are unfounded; and its legal argument is built around a premise—that an "official proceeding" was already pending when documents were discarded—that the Fifth Circuit rejected and that contradicts the SEC's own regulations.

The Fifth Circuit's interpretation of this statute, and the jury instructions it approved, permit conviction for a wide range of conduct that reasonable individuals would not understand to be criminal, and therefore violates common sense, fairness, the rule of lenity, and the doctrine of constitutional doubt. This case appropriately raises several related issues because that defect could be cured in different ways, including the interpretation of "corruptly" adopted by the Third and D.C. Circuits, a consciousness of wrongdoing requirement, or a meaningful nexus requirement like the one that this Court imposed in *United States v. Aguilar*, 515 U.S. 593 (1995). But this conviction cannot stand under any permissible interpretation of the text, and the circuit conflict conceded by the opposition merits review.

1. The United States devotes much of its opposition to a misleading and one-sided recital of the facts. This reply addresses a few of the more significant errors and omissions in that summary,[1] but the opposition largely misses the

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[1] For example, it is misleading to assert that the document retention policy was not "implemented" until October 12. Opp. 5. Some team members were already in compliance (Tr. 5138-39) and the others were cognizant of the need to comply (*e.g.*, Tr. 3339). Nor is it accurate to suggest that Andersen's policy required retention of all documents by October 12 when Nancy Temple sent a reminder about the policy. Even though Temple indicated that she viewed a future SEC proceeding as a

point. Andersen made clear that it "did not dispute that the evidence was sufficient to support this [conviction]" under the instructions that were given. Pet. 4. Andersen's only factual argument has been that a properly instructed jury could have acquitted—and presumably would have—since the jury declared itself deadlocked after ten days of deliberations even when given instructions that vitiated the government's duty to prove any criminal *mens rea*. There is no legally sufficient evidence that anyone persuaded another to violate a legal duty or believed that their conduct was wrongful, and plenty of evidence from which the jury could have concluded that Andersen did not believe that an SEC proceeding was likely. Indeed, the opposition labors to obscure the undisputed fact that Andersen *was actually correct* in its belief that the accounting issues it was working on in September and October (relating to the "Raptors" entities) would not require an income restatement or lead to a formal SEC proceeding. In the end, they did not. The restatement, and an SEC subpoena, were ultimately the product of Andersen's discovery, for the first time on November 2, 2001, that Enron had withheld information about an entirely different venture called Chewco. *See* Pet. 7-9. The instructional errors discussed in the petition thus cannot be harmless. *The opposition never argues otherwise.*

2. The petition pointed out the absurdity of holding that it was somehow criminally "corrupt" behavior for David Duncan to ask his secretary to discard a document, at a time when it would have been lawful for either of them to discard the document themselves. The brief in opposition glides

"reasonable possibility" (Pet. 5), the SEC had *not* "threatened litigation," which was the trigger for retention of all documents under the policy language cited by the government. And the assertion (Opp. 7) that David Duncan acted out of concern that the "'extraneous material' in petitioner's files could be used against it in ... the SEC investigation" mischaracterizes the testimony. He worried that preliminary materials could be "taken out of context" (Tr. 1888), but repeatedly emphasized that the compliance effort was intended to "make sure we [had] the complete picture ... in case the SEC wants to look at this one day." Tr. 2482.

over that difficulty, and many others, by repeatedly asserting that "during the period when most of the documents were destroyed, petitioner knew that the SEC was investigating Enron, and its decision to destroy documents was thus itself a crime under 15 U.S.C. § 1505." Opp. 20 n.13; *see also id.* at 18, 28-29. The United States even suggests that the Fifth Circuit agreed with its radical view that an informal agency investigation is an "official proceeding," and that petitioner waived the issue. *Id.* at 28. The United States's argument that review should be denied because it could have charged Andersen under § 1505 is unpersuasive; it did not use that section, and could not have.

First, the United States itself obviously did not believe the position it is now advancing or it would have charged Andersen with a violation of § 1505 rather than this novel and convoluted "witness tampering" theory. An "official proceeding" is "a proceeding *before* a Federal Government agency which is authorized by law." 18 U.S.C. § 1515(a)(1)(C) (emphasis added). The leading case on what constitutes a "proceeding" of the SEC under § 1505 held it includes "any investigation directed by a formal order of the Commission, at which a designated officer takes testimony under oath." *United States v. Batten*, 226 F. Supp. 492, 494 (D.D.C. 1964), *cert. denied*, 380 U.S. 912 (1965); *see also United States v. Kelley*, 36 F.3d 1118, 1127 (D.C. Cir. 1994) ("'mere police investigation'" is not a "'proceeding'" under § 1505) (quoting *Batten*); *United States v. Senffner*, 280 F.3d 755, 761 (7th Cir. 2002). The opposition concedes that an informal investigation is not a "proceeding" under the SEC's own regulations and does not have subpoena power. Opp. 29 n.20. The government cites no case holding that an informal investigation like this one could be a "proceeding" under § 1505; indeed, the cases it cites simply follow *Batten*.[2]

[2] *United States v. Browning, Inc.*, 572 F.2d 720, 724 (10th Cir.), *cert. denied*, 439 U.S. 822 (1978), held that a Customs investigation was a "proceeding," but noted that those investigators *had* subpoena power (even if it was not exercised), and, citing *Batten*, specifically distinguished informal investigations by the SEC—stating that "the S.E.C. has more of

Second, although both petitioner and the United States addressed this issue below in lengthy footnotes (with extensive citations), the Fifth Circuit did not find a waiver and it did not agree with the government on the merits. To the contrary, it clearly agreed with petitioner that the informal September/October SEC investigation of Enron was not a "proceeding" and did not become one until the SEC opened a formal investigation in November. The court wrote that "[p]ossible proceedings became a reality on November 8, 2001, when Andersen received an SEC subpoena." Pet. App. 5a. The court reasoned that Andersen "must have known" in September and October "that a restatement of earnings of any appreciable size by a Fortune 500 company would prompt a formal SEC investigation and subpoena for its documents." *Id.* at 12a. But it conspicuously did not hold that the informal investigation that was *already ongoing* was sufficient to make Andersen's conduct a crime. *See id.* at 28a (stating that "the SEC was the feared opponent and initiator of a proceeding" during the relevant period). The Fifth Circuit

a tribunal character than do many other administrative agencies." In *United States v. Leo*, 941 F.2d 181, 198 (3d Cir. 1991), the government conceded that a "proceeding" requires an agency with "rule-making or adjudicative authority." *Rice v. United States*, 356 F.2d 709, 712-13 (8th Cir. 1966), held that an NLRB investigation was a proceeding, but again the government principally relied on the Board's own regulations—which "refer[red] to its investigative aspects as being 'proceedings.'" The court also stressed that a detailed, sworn complaint was filed with the Board that was the "practical equivalent" of a filing in court that would initiate judicial proceedings. *Id.* at 714. And it quoted *Batten* at length for its distinction between "'mere police investigation[s]'" and formal SEC hearings that are "'directed by a formal order of the Commission, [and] at which a designated officer takes testimony under oath.'" *Id.* at 714-15 (quoting *Batten*, 226 F. Supp. at 494). *United States v. Fruchtman*, 421 F.2d 1019, 1021 (6th Cir.), *cert. denied*, 400 U.S. 849 (1970), relied on *Rice* and *Batten to* hold that an vaguely described FTC investigation was a "proceeding." It appears that the investigator had power to administer oaths and issue subpoenas under FTC regulations. *See* 27 Fed. Reg. 4609, 4610 (May 16, 1962) (authorizing investigating representatives of the Commission to administer oaths and affirmations at § 1.32, and at § 1.35 the issuance of subpoenas "related to any matter under investigation").

took Andersen's "nexus" arguments seriously, and ultimately rejected them on other grounds. *Id.* at 25a-28a. If the court had believed that an "official proceeding" was already pending it would have dismissed them as frivolous.

3. The government's suggestion that the decision below "will have little future impact" because the new 18 U.S.C. § 1519 will be the sole charge in future cases has no merit. Opp. 13. First, § 1519 applies only to tampering with "record[s], document[s], or tangible object[s]," and thus cannot be used in the witness tampering cases most commonly prosecuted under § 1512. Nearly all of the key § 1512 cases discussed in the petition and opposition could not have been prosecuted under § 1519. *See, e.g., Davis*, 183 F.3d at 250 (defendant encouraged mobster to kill FBI informant); *United States v. Farrell*, 126 F.3d 484, 486 (3d Cir. 1997) (defendant threatened coconspirator with retaliation if he cooperated with investigators); *United States v. Morrison*, 98 F.3d 619, 629 (D.C. Cir. 1996) (defendant asked witness to lie to police), *cert. denied*, 520 U.S. 131 (1997); *United States v. Shotts*, 145 F.3d 1289, 1299-300 (11th Cir. 1998) (defendant asked employees not to cooperate), *cert. denied*, 525 U.S. 1177 (1999); *United States v. Thompson*, 76 F.3d 442, 447 (2d Cir. 1996) (defendant advised fellow drug dealers not to cooperate). In 2003 and 2004, there have been at least seven written opinions in § 1512(b) "corrupt persuasion" cases, none of which could have been brought under § 1519.[3] And an untold number of indictments did not generate written, searchable opinions.

Second, § 1519 is limited to obstruction of matters "within the jurisdiction of any department or agency of the

[3] *See, e.g., United States v. LaFlam*, 2004 U.S. App. LEXIS 10239 (2d Cir. May 25, 2004), *cert. denied*, 125 S. Ct. 363 (2004); *United States v. Vitagliano*, 86 Fed. Appx. 470 (2d Cir. 2004); *United States v. Amato*, 86 Fed. Appx. 447 (2d Cir.), *cert. denied*, 125 S. Ct. 38 (2004); *United States v. Silas*, 81 Fed. Appx. 758 (3d Cir. 2003); *United States v. Genao*, 343 F.3d 578 (2d Cir. 2003); *United States v. Boyd*, 309 F. Supp. 2d 908 (S.D. Tex. 2004); *United States v. Perez*, 2003 U.S. Dist. LEXIS 15968 (D. Conn. Aug. 29, 2003).

United States." By contrast, § 1512(b) covers all "official proceedings," including civil actions brought by private plaintiffs. Corporate document destruction policies are often designed, at least in part, to prevent aggressive plaintiffs' lawyers from using early or incomplete drafts out of context. That objective is lawful under § 1519, but is a serious felony under the Fifth Circuit's interpretation of § 1512(b). Resolving this circuit split is of great importance to companies willing to cooperate with government investigations but wishing to limit exposure to civil lawsuits.

The Fifth Circuit's interpretation of § 1512(b) permits conviction for a broad range of conduct not covered by § 1519—as illustrated by the serious concerns raised by the Washington Legal Foundation, the Chamber of Commerce of the United States, and the National Association of Criminal Defense Lawyers as *amicus curiae* in this Court.

4. There is a square conflict in the circuits. As the petition explained, any doubt about the law of the Third Circuit after *Farrell* was resolved by *Davis*, which squarely holds that an "improper purpose" instruction like the one given in this case is reversible error. The United States's sole response is a single sentence, which agrees: "In [*Davis*] the court appeared to rely (without any further analysis) on *Farrell's* dicta that 'corrupt' conduct requires more than an 'improper purpose.'" Opp. 20. It therefore concedes that a split exists. As the petition explained, the Third Circuit's subsequent decision in *United States v. Applewhaite*, 195 F.3d 679 (3d Cir. 1999), did not reconsider *Davis* (and could not have—since *Davis* is circuit precedent), and is easily distinguishable on the ground that persuading someone to destroy evidence of a known crime is inherently corrupt. (Indeed it is criminal under 18 U.S.C. § 3). The opposition's response depends on its mistaken assertion that an "official proceeding" was already ongoing in October. Opp. 20 n.13.

The opposition argues that *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), *cert. denied*, 506 U.S. 1021 (1992), does not conflict with this decision because it was decided under § 1505 and distinguished § 1503, which the

government claims § 1512 was "modeled" on. But of course *the D.C. Circuit disagrees*, since it concluded in *Morrison* that § 1512 is similar to § 1505 and that *Poindexter* should govern § 1512 cases. Congress did attempt to overrule *Poindexter* by statute, but went out of its way to provide that "the term 'corruptly' means acting with an improper purpose" *only* "[a]s used in section 1505." 18 U.S.C. § 1515(b). And *Poindexter* squarely holds that an "improper purpose" instruction is vague and likely unconstitutional. Section 1515(b) may force the D.C. Circuit to reach that constitutional issue in the next § 1505 case, but the reasoning of *Poindexter* and *Morrison* makes clear it would never interpret "corruptly" in § 1512 to mean an "improper purpose" unless forced to that interpretation by Congress.

5. On the merits, the United States argues that its "improper purpose" interpretation does not render the word "corruptly" superfluous, because an employee might destroy "embarrassing personal emails" without having an intent to impede the "investigation itself." For present purposes the most important point is that this issue is difficult enough to divide the Circuits. The instruction actually given in this case also defined "corruptly" as an intent to impede "the factfinding ability" of the SEC's investigation—not the investigation itself. There is simply no space between an intent to deprive the SEC of documents that it has asked for and an intent to impede the SEC's "factfinding ability"—but even if there were, that would be slicing the onion so finely that it cannot possibly be what Congress intended.

The opposition's argument (at 18) that Congress has since "closed" that apparent "statutory gap" by passing the new §§ 1512(c) and 1519 commits the classic error of relying on subsequent legislative history to interpret the product of an earlier Congress. That is completely impermissible. If anything, the fact that Congress felt the need to pass new statutes in response to this case suggests its awareness that existing law did not cover Andersen's conduct.

The United States also argues that the interpretation adopted by the Third and D.C. Circuits injects "incongruity"

into the overall scheme of the obstruction statutes because "corruptly" means "improper purpose" under §§ 1503 and 1505. Certainly that is now true of § 1505, although it may well be unconstitutional. But again Congress conspicuously restricted that definition to § 1505. And, as the petition explains, the assertion that "corruptly" has always meant only an "improper purpose" in § 1503 is misleading. Pet. 23. Certainly some courts have given that instruction but many others (including the Fifth Circuit) do not, and in any event § 1503 instructions also require the jury to find that the defendant intended to interfere with a particular, *pending* judicial proceeding—a factual context in which obstruction is inherently corrupt. This Court has squarely rejected the notion that, without such a nexus to a particular pending proceeding, "*any* act, done with the intent to 'obstruct . . . the due administration of justice,' is sufficient to impose criminal liability," even though a jury could easily consider that intent an "improper purpose." *Aguilar*, 515 U.S. at 602.

The government's focus on the § 1512 legislative history rather than the statute's language and structure is of course inappropriate, particularly in a criminal case where the rule of lenity applies. But that history illustrates the flaw in the government's reasoning. The opposition asserts that the "corruptly persuades" clause "was intended 'merely to include in section 1512 *the same protection of witnesses from non-coercive influence that was (and is) found in section 1503.*'" Opp. 17 (quoting 134 Cong. Rec. S17,369 (daily ed. Nov. 10, 1988)). But the instructions given in this case in fact make § 1512 into a *radical expansion* of § 1503. The petition gave many examples of routine conduct that would be criminal under the government's interpretation of § 1512 that were not before. Pet. 17-18. And the instructions here, by omitting any nexus requirement, would clearly permit under § 1512 the conviction this Court reversed in *Aguilar*.

More broadly, the opposition tries to limit the Third Circuit's decision in *Farrell* to its facts but never grapples with why that case was hard. Why, exactly, is suggesting that someone invoke their Fifth Amendment rights not

"corrupt?" If (as in *Farrell*) the speaker's motivation was to evade punishment for a crime then that is certainly an "improper purpose" and intended to harm the factfinding ability of an official proceeding. But it nonetheless is not "corrupt" because of a common understanding that, in a free society like ours, certain forms of non-cooperation fall within the boundaries of legitimate self-defense under the law. The theory of this prosecution makes a criminal out of anyone who advises a friend not to comply with a voluntary request for documents from the SEC, to construe a subpoena narrowly rather than broadly, or to invoke their lawful rights under the constitution. *The brief in opposition never denies that.* The phrase "corruptly persuades" is plainly insufficient to put a person of common intelligence on notice that such a radical transformation of the law has occurred.

The opposition objects to the petition's "due process rhetoric" and suggests that any due process claim has been waived. Opp. 13-14, 21. That is a red herring. Even the Fifth Circuit acknowledges that "corruptly persuades" is vague, Pet. App. 19a, and the *Farrell/Poindexter* reading is plainly a permissible one. Common sense, the rule of lenity, and the doctrine of constitutional doubt therefore require it—and there is thus no need to reach the constitutional issue. But petitioner has properly argued, here and below, that due process and lenity "fair warning" values must inform the interpretation of this statute. *See* Appellants Br. at 59, 67, 75; Reply Br. at 1, 21-24. And the facts of this case plainly supported the conclusion that Andersen employees had no warning that their conduct was unlawful. Pet. 7.

6. The opposition's discussion of *Ratzlaf v. United States*, 510 U.S. 135 (1994), and *Bryan v. United States*, 524 U.S. 184 (1998), misses the petition's point. True, the *mens rea* term "corruptly" does not always require consciousness of wrongdoing. But if a statute is otherwise interpreted to criminalize conduct that is not "obviously 'evil'" or "inevitably nefarious," *Ratzlaf*, 510 U.S. at 144-46, fair warning and lenity principles may require that vague *mens rea* terms like "willfully" or "corruptly" be given a stronger

than usual meaning. If the *Farrell/Poindexter* limiting construction of the word "corruptly" and the various nexus instructions requested by petitioner are all rejected, this statute criminalizes conduct that a reasonable person would not understand to be criminal. The United States entirely misunderstands *Ratzlaf* and *Bryan* by suggesting that their holding is bound up with the word "willfully"—which is just as vague as "corruptly," does not usually require knowledge of wrongdoing either, and as a matter of plain meaning conveys much less culpability and awareness of wrongdoing.

7. The opposition argues that petitioner waived the nexus issue by failing to request an instruction that it could not be found guilty unless it believed an SEC proceeding was "likely" or "probable," or by not citing *Aguilar*. Opp. 24-26. But Andersen consistently argued that the instructions were incorrect because they failed to require a meaningful nexus between its conduct and some concretely threatened particular proceeding. Because the Fifth Circuit had already stated in *United States v. Shively*, 927 F.2d 804, 812-13 (5th Cir.), *cert. denied*, 501 U.S. 1209 (1991), that § 1512 requires an "intent to affect testimony at some particular federal proceeding that is ongoing or scheduled to be commenced in the future," petitioner phrased its requested instruction that way. A defendant that clearly explains why an instruction is incorrect need not guess precisely what formulation an appellate court will ultimately hold to be correct. Pet. 29. The opposition cites no contrary precedent. And Andersen did cite *Aguilar*. R. 931.

The opposition's argument at 24 n.16 that Andersen *did* know an official proceeding was "likely" or "probable" is an irrelevant factual quarrel. There was plenty of evidence that would permit the jury to reach a different conclusion, and the opposition does not even suggest that this error was harmless beyond a reasonable doubt. *See* Pet. 29.

CONCLUSION

Andersen had no fair warning that its conduct might be criminal, and would not have been convicted in the Third or D.C. Circuits. Review is necessary to resolve that conflict.

Respectfully submitted,

KERRY A. MILLER
ARTHUR ANDERSEN LLP
33 W. MONROE
18TH FLOOR
CHICAGO, IL 60603
(312) 507-2072

MAUREEN E. MAHONEY
Counsel of Record
J. SCOTT BALLENGER
MATTHEW K. ROSKOSKI
LATHAM & WATKINS LLP
555 11TH STREET, N.W.
SUITE 1000
WASHINGTON, DC 20004
(202) 637-2200

CHARLES A. ROTHFELD
LEE H. RUBIN
MAYER, BROWN, ROWE & MAW LLP
1909 K STREET, N.W.
WASHINGTON, DC 20006
(202) 263-3000